Supreme Court, U.S.
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NO. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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THE STATE OF TEXAS,
Petitioner

v.

WILLIAM E. WALKER, M.D.,
Respondent

****

PETITION FOR WRIT OF CERTIORARI

****

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QUESTION PRESENTED FOR REVIEW

Do federal bankruptcy courts have jurisdiction, notwithstanding the Eleventh Amendment, to enter discharge orders that bind nonconsenting States?

LIST OF ALL PARTIES TO PROCEEDING

In addition to the parties named in the caption, the following additional parties were present in the proceeding below, having been named in counterclaims filed by the Respondent/Defendant/Third Party-Plaintiff:

Board of Regents of the University of Texas System
Thomas Ollis Hicks
Ellen Clarke Temple
Bernard Rapaport
Thomas Loeffler
Robert James Cruikshank
Zan W. Holmes, Jr.
Martha Ellen Smiley
Lowell H. Lebermann, Jr.
Mario Efrain Ramirez, M.D.
M. David Low, M.D.

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CITATION TO CASE AS REPORTED BELOW

The opinion of the United States Court of Appeals for the Fifth Judicial Circuit in this case may be found at *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998).

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court under 28 U.S.C. § 1254. The Fifth Circuit's judgment sought to be reviewed was entered May 28, 1998. As to the issue on which review is sought (the effect of the Eleventh Amendment on discharge orders in bankruptcy), the Fifth Circuit's opinion and judgment fully and finally dispose of such issue in this case.

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, § 8:

The Congress shall have Power ... To establish ... uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Constitution, Amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

11 U.S.C. § 727(a):

The court shall grant the debtor a discharge, unless – [10 identified reasons]

11 U.S.C. § 524(a):

A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extentthat such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727 ... of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived ...

STATEMENT OF THE CASE

Dr. William E. Walker, a faculty member at the University of Texas Health Science Center ("UTHSC") in Houston (an institution of higher education of the State of Texas), filed a Chapter 7 bankruptcy petition on September 1, 1992. On January 19, 1993, the bankruptcy court entered an order, pursuant to 11 U.S.C. § 727(a), granting Dr. Walker a discharge from his prepetition debts. When he filed his bankruptcy schedules, Dr. Walker did not identify UTHSC or the State of Texas as a creditor. The State therefore received no notice of the bankruptcy filing and had no opportunity to object to the bankruptcy court's entry of a discharge order.

In February, 1995, the State of Texas sued Dr. Walker in state district court, alleging that Dr. Walker had converted to his personal use professional fees that, by assignment pursuant to a contract executed by Dr. Walker, belonged to the State. Dr. Walker answered by alleging that any debts he owed to the

State had been discharged by the bankruptcy court's order. He counterclaimed against the State under various theories of recovery, including denial of due process and equal protection, relying on 42 U.S.C. § 1983. Dr. Walker also asserted counterclaims under several theories of state law. In addition to counterclaims against the State, Dr. Walker filed third-party claims against members of the University of Texas System Board of Regents in their individual capacities and the president of UTHSC (Dr. M. David Low), in both his individual and official capacities. The individual counter-defendants removed the case to federal court based upon federal question jurisdiction.

In federal district court the State counter-defendants and third-party defendants moved for summary judgment on all claims. The district court dismissed all of Dr. Walker's claims against the University based upon its Eleventh Amendment immunity, as it did for all claims against the official capacity defendants. Dr. Walker did not seek prospective injunctive relief against the officials. The district court granted summary judgment, based upon qualified immunity against Dr. Walker on his federal constitutional due process claims against the individual capacity defendants. However, the district court granted in part Dr. Walker's motion for summary judgment with regard to his contention that any obligation he had to the University for the assigned professional fees he retained had been discharged by the January 19, 1993 bankruptcy court discharge order, as a result of his September 7, 1992, Chapter 7 bankruptcy petition.

The district court determined that Dr. Walker had no personal liability for professional fees he kept prior to September 7, 1992. The State contends that Dr. Walker converted professional fees he had assigned to the UTHSC and held in trust for the State under Dr. Walker's employment contract. That issue has not been litigated, due to the trial court's granting of Dr. Walker's summary judgment motion on pre-September 7, 1992 fees. The district court remanded to state court the State's suit to

collect any professional fees retained after September 7, 1992. The court also remanded to state court all of Dr. Walker's state law claims against the defendants.

Both the State and Dr. Walker appealed the district court's resolution of issues. The State appealed the granting of Dr. Walker's summary judgment based upon a discharge in bankruptcy. Dr. Walker appealed the district court's grant of summary judgment to the individual counter-defendants based upon qualified immunity.

The Fifth Circuit affirmed in part and reversed in part. With respect to bankruptcy discharge, the Fifth Circuit held that the Eleventh Amendment does not prevent entry of discharge orders as against states. The discharge order in Dr. Walker's case was therefore held to be a valid discharge of his personal liability on debts to the State unless on remand the State, having received notice, can prevail on contesting the *dischargeability* of its claims against Dr. Walker under particular grounds set forth in 11 U.S.C. § 523(a).[1] The Fifth Circuit affirmed the district court's dismissal, on qualified immunity grounds, of Dr. Walker's claims against the individual counter-defendants.

The only aspect of the Fifth Circuit's decision on which the State of Texas seeks a writ of certiorari is its holding that the Eleventh Amendment does not bar bankruptcy courts from entering discharge orders that bind non-consenting states.

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[1]The State contends that Dr. Walker converted to his own use funds that, by contract, legally belonged to the State. If the State is correct that trust funds were involved [*See, e.g., In re Moskowitz*, 14 B.R. 577 (Bankr. S.D. N.Y. 1981) and *University of Texas Medical Branch v. Allan*, 777 S.W. 2d 450, 454 (Tex.Ct. App. 1989)], the debts may be nondischargeable under 11 U.S.C. § 523(a)(4) or (6).

REASONS FOR GRANTING THE WRIT

ARGUMENT AND AUTHORITIES

I. DESPITE GROWING CONFLICTS ON THE ISSUE IN THE LOWER COURTS, THERE IS NO IN REM JURISDICTION EXCEPTION TO THE ELEVENTH AMENDMENT FOR BANKRUPTCY CASES.

Using its power granted under the Bankruptcy Clause of Art. I, § 8 of the Constitution, Congress conferred upon federal bankruptcy courts the authority to grant orders discharging debtors from personal liability for prepetition debts. In Chapter 7 cases like Dr. Walker's, such authority is set forth in 11 U.S.C. § 727(a), which provides for the entry of discharge orders unless one of ten specified reasons for denying a discharge exists.

Discharge orders provide both declaratory and injunctive relief against creditors. Under 11 U.S.C. § 524(a)(2), entry of a discharge order has the effect of permanently enjoining prepetition creditors from pursuing collection of personal debts of the debtor. Additionally, entry of a discharge order has the effect of declaring void all pre-bankruptcy judgments against the debtor, to the extent such judgments determined the personal liability of the debtor. (Though not relevant here, liens against a debtor's property, as a general rule, survive bankruptcy.)

The Eleventh Amendment not only bars federal courts from granting retroactive monetary relief against non-consenting states [*Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347 (1974)], it also proscribes the granting of injunctive relief [*Cory v. White*, 457 U.S. 85, 102 S.Ct. 2325 (1976)], a request for interpleader [*id.*], or the award of declaratory relief [*Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1985)]. As this Court noted in *Seminole Tribe v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 1124 (1996), "[t]he

Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,'" citing *Hess v. Port Authority Trans-Hudson Corp*, 513 U.S. 30, 47, 115 S.Ct. 394, 404 (1994).

Since a discharge order in a bankruptcy case results in injunctive and declaratory relief against states, relief that the Eleventh Amendment normally precludes as to non-consenting states, the source of bankruptcy court authority to enter such orders against states bears close scrutiny. According to the Fifth Circuit in this case, bankruptcy court jurisdiction to enter orders such as discharge orders "derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates." 142 F.3d at 822.

The Fifth Circuit borrowed both the language and the idea of bankruptcy court jurisdiction being derived from "jurisdiction over debtors and their estates" from a recent Fourth Circuit case, *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir. 1997) ("*Antonelli*"), a case involving the effect of Chapter 11 confirmation orders on non-consenting states.[2] At least one federal district court has wasted no time in adopting the same rationale: "[T]he bankruptcy court's authority to enter the April 4 order [declaring an ex-debtor to be entitled to state tax refunds], like its authority to enter the confirmation order, derived not from its jurisdiction over the Commonwealth of Pennsylvania ..., but rather from its continued jurisdiction over [the debtor] and the Plan." *Clerk of the Circuit Court v. NVR Homes, Inc.*, ___ B.R. ____ , 1998 WL 410882, *5 (E.D. Va. 1998) ("*NVR Homes*"), reversing *In re N.V.R. L.P.*, 206 B.R. 831, 843-44 (Bankr. E.D. Va. 1997).

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[2]While discharge, *per se*, was not at issue in *Antonelli*, entry of a Chapter 11 confirmation order also generally has the effect of discharging pre-confirmation debts, pursuant to 11 U.S.C. § 1141(d).

The legal theory emerging from the Fifth Circuit's decision in this case, and from cases such as *Antonelli* and *N.V.R. Homes, Inc.* is this: bankruptcy court jurisdiction over debtors and their estates overrides the Eleventh Amendment. A brief review of such theory shows it to be directly contradicted by well-established Supreme Court case law. Despite this Court's explicit rejection of the notion that in rem jurisdiction or any form of ancillary or pendent jurisdiction can override the Eleventh Amendment, lower courts, including the Fifth Circuit in this case, are creating a *de facto* in rem jurisdiction exception to the Eleventh Amendment for bankruptcy cases.

Bankruptcy courts, like the district court in *NVR Homes*, have been quick to pick up the "in rem jurisdiction" banner. *O'Brien v. Vermont (In re O'Brien)*, 216 B.R. 731, 737 (Bankr. D. Vt. 1998)("Our in rem jurisdiction over property of the debtor and the estate empowers us to determine all claims that anyone, whether named in the action or not, has to the property ..."); *In re Barrett Refining Corp.*, ___B.R.___ 1998 WL 324191, *8 (Bankr. W.D. Okla. 1998)("A bankruptcy case is such that the bankruptcy court exercises its jurisdiction over the debtor and the property of the estate.")

Bankruptcy Appellate Panels in the Sixth and Ninth Circuits, however, have expressly rejected the suggestion that bankruptcy courts' in rem jurisdiction overrides the Eleventh Amendment. In *French v. Georgia (In re Abepp Acquisition Corp.)*, 215 B.R. 513, 516 (6th Cir. BAP 1997), the Sixth Circuit BAP relied upon *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38, 112 S.Ct. 1011, 1016 (1992), a case involving the federal government's sovereign immunity in which this Court stated: "[W]e have never applied an in rem exception to the sovereign immunity bar against monetary recovery, and have suggested no such exception exists." More recently, the Ninth Circuit Bankruptcy Appellate panel reached the same conclusion in a case where the debtor sought purely declaratory relief, expressly rejecting the argument that a

bankruptcy court's in rem jurisdiction empowered it to grant such relief. *Mitchell v. California Franchise Tax Board (In re Mitchell)*, --- B.R. ---, 1998 W L 437395, *6-7 (9th Cir. BAP).

Conflict is therefore evident in the case law in the lower courts on the question of whether a bankruptcy court's in rem jurisdiction trumps the Eleventh Amendment. For some reason, none of the recent cases consider the effect of a decision of this Court that, at least until last term's *California v. Deep Sea Research*, ___U.S. ___, 118 S.Ct. 1464 (1998) decision, appeared to have resolved the question of whether there are any in rem jurisdiction exceptions to the Eleventh Amendment.

Missouri v. Fiske, 209 U.S.18, 54 S.Ct.18 (1933) stands squarely in the way of any in rem jurisdiction exception to the Eleventh Amendment. In that case, a federal district court had in rem jurisdiction over some valuable shares of stock, ownership of which was in dispute. The parties to the district court suit attempted to join the State of Missouri, which claimed a tax lien on the stock. The district court, and the Eighth Circuit on appeal, proceeded to determine Missouri's legal rights, basing their authority to do so on the case being "in the nature of an action *in rem* and concerning a *res* in which [the parties] were legally interested." *Fiske v. Missouri*, 62 F.2d 150, 153 (8th Cir. 1932).

On appeal, this Court reversed, finding that the purpose of "protect[ing] the jurisdiction of the federal court" was insufficient to overcome the Eleventh Amendment, even where a federal court's jurisdiction was "*in rem*, or *quasi in rem*." 290 U.S. at 27-28, 54 S.Ct. at 21. "The exercise of the judicial power cannot be protected by judicial action which the Constitution specifically provides is beyond the judicial power." *Id.* In rather sweeping language, this Court held that there was no in rem jurisdiction exception to the Eleventh Amendment "whatever the nature of the suit." *Id.* More recently, in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121, 104 S.Ct. 900, 919 (1984), this

Court emphasized that "neither pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment."

Despite such pronouncements, the Fourth and Fifth Circuits, and lower courts now following their leads, have fashioned an Eleventh Amendment exception based upon bankruptcy courts' "jurisdiction over debtors and their estates." They have done so without in-depth analysis of just what kind of jurisdiction may be derived from "debtors and their estates."

The idea that "jurisdiction over debtors," in and of itself, can override states' Eleventh Amendment rights, is far-fetched. If jurisdiction over *a party seeking relief against states* is enough to confer jurisdiction over a non-consenting state, then federal court jurisdiction over an Indian tribe should have been sufficient to defeat the Eleventh Amendment in *Seminole*. It was not, of course, and neither does it make sense to say that a Congressional grant of jurisdiction over debtors pursuant to the Art. I, § 8 bankruptcy power can overcome the Eleventh Amendment.

The force of the "jurisdiction over debtors and their estates" concept therefore must lie in the second half of that phrase: jurisdiction over "their estates." A "bankruptcy estate" is a well-defined, and far-reaching, term under 11 U.S.C. § 541(a). Bankruptcy estates consist of all of a debtor's property, both tangible and intangible, owned as of the bankruptcy petition date, and even some types of property acquired post-petition. All "legal or equitable interests" of a debtor become "property of the estate" upon the filing of a petition, under § 541(a). Bankruptcy courts therefore have broad jurisdiction to deal with legal and equitable interests in debtors' property.

The question needing to be answered is whether such in rem jurisdiction over debtors' property and legal rights is enough to defeat the Eleventh Amendment when debtors seek relief against states. That question was posed in briefs, but not answered, only

last term when this Court considered *California v. Deep Sea Research*, __ U.S. __, 118 S.Ct. 1464 (1998). With no reference whatsoever, in the briefs or in the opinion, to *Fiske*[3], the Court carved out a limited exception to *Fiske*'s statement that in rem jurisdiction does not override the Eleventh Amendment "whatever the nature of the suit." 290 U.S. at 28, 54 S.Ct. at 21. Without mentioning *Fiske*, *Deep Sea Research* modified the "whatever the nature of the suit" statement to now read, in effect, "whatever the nature of the suit ... except for admiralty cases in which the state does not have possession of the vessel."

The reasoning of the Fifth Circuit here, the Fourth Circuit in *Antonelli* and the lower courts following the leads of those cases now suggests that another exception should be made to *Fiske*. Instead of there being no in rem jurisdiction exception to the Eleventh Amendment "whatever the nature of the suit," there should be two exceptions, according to these cases: the admiralty exception of *Deep Sea Research* and the bankruptcy exception that is now in the process of being created by some, but not all, courts.

This Court, not the lower federal courts, should determine if additional in rem jurisdiction exceptions to the Eleventh Amendment exist. The issue discussed, but not resolved, in briefs and oral argument[4] in *Deep Sea Research* – whether there is a bankruptcy in rem jurisdiction exception to the Eleventh Amendment – needs to be resolved by this Court. The issue is a

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[3]A review of the *Deep Sea Research* briefs and oral argument transcript reveals that, inexplicably, the parties never cited *Fiske* to the Court. Nor, based on its opinion, did the Court review on its own the applicability of *Fiske*.

[4]Oral argument transcript, 1997 WL 751917, at 16 (court's pagination): "And my related question is, what's supposed to happen in bankruptcy proceedings, another instance, I take it, where every day courts decide who owns property as ... against the world?"

recurring, important and potentially far-reaching one in bankruptcy cases. For example, bankruptcy courts' jurisdiction over "debtors and their estates" not only includes jurisdiction over debtors' and estates' tangible property, such jurisdiction also extends to intangible property, including avoidance actions [*e.g.*, preferences and fraudulent conveyances] maintainable under 11 U.S.C. §§ 544-550. Recoveries in such actions are specifically made "property of the estate" by 11 U.S.C. § 541(a)(3). If jurisdiction over debtors and their estates is sufficient to defeat states' Eleventh Amendment rights, then post-*Seminole* cases such as *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington D.C., Inc.)*, 119 F.3d 1140 (4th Cir. 1997)(refusing to adjudicate debtor's preference claims against state agency), *Louisiana v. PNL Asset Management Co. (In re Fernandez)*, 123 F.3d 241 (5th Cir. 1997)(refusing to adjudicate state's title to property also claimed by debtor) and *Sacred Heart Hospital v. Pennsylvania (In re Sacred Heart Hospital)*, 133 F.3d 237 (3d Cir. 1998)(refusing to hear debtor's claims for reimbursement from state) were all wrongly decided. In each of those cases, "jurisdiction over the debtors and their estates" was clearly present, yet the Eleventh Amendment was held to bar relief against a state. Unless the procedural posture alone of a dispute with a state determines whether the Eleventh Amendment applies (see point II below), the Courts of Appeals are being inconsistent in applying their theory that "jurisdiction over debtors and their estates" trumps the Eleventh Amendment.

Not only is the existence of an in rem jurisdiction exception to the Eleventh Amendment an important issue in many bankruptcy cases, resolving the issue in this case will provide the Court with an opportunity to resolve the apparent tension between the "whatever the nature of the suit" language in *Fiske* and the admiralty in rem jurisdiction exception adopted in *Deep Sea Research*. Lower courts need direction as to which case provides the proper rule for decision, and whether any non-admiralty in rem jurisdiction exceptions to the Eleventh Amendment exist.

II. WHETHER AN ACTION AFFECTS A STATE'S INTEREST, NOT THE PROCEDURAL CONTEXT IN WHICH AN ORDER IS SOUGHT, SHOULD DETERMINE WHETHER THE ELEVENTH AMENDMENT APPLIES.

Prior to the Fifth Circuit's decision in this case and the Fourth Circuit's opinion in *Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777 (4th Cir.1997), Eleventh Amendment law seemed to be fairly well settled that federal courts should consider the potential effect on a state as the key factor in determining whether the Eleventh Amendment was implicated. *Papasan v. Allain*, 478 U.S. 265, 278, 106 S. Ct. 2932, 2941 (1986)(federal courts should "look to the substance rather than the form of relief sought" in Eleventh Amendment cases). "The nature of a suit as one against the state is to be determined by the nature and effect of the proceeding." *Ford v. Indiana*, 323 U.S. 459, 464, 65 S. Ct. 347, 350 (1945). Cases should "focus on the Eleventh Amendment's respect for state autonomy, and not on the procedural status of the case." *Thomas v. FAG Bearings Corp.*, 50 F.3d 502 (8th Cir. 1995)(holding that a "limited effect" joinder of a state was nonetheless barred by the Eleventh Amendment). *See also University of Texas v. Vratil*, 961 F.3d 1337 (10th Cir. 1996)(Eleventh Amendment implicated by burden of discovery, as a party, in suit filed against another party).

On this issue, too, *Missouri v. Fiske*, 290 U.S. 18, 54 S.Ct. 18 (1933), in which parties to an existing suit sought to join a state by "an ancillary and supplemental bill", seemed to provide guidance for decisions. In answering the question "What is a suit?" for Eleventh Amendment purposes, *Fiske* quoted extensively from Chief Justice Marshall's opinion in *Cohens v. Virginia*, 6 Wheat. 264, 407, 5 L.Ed. 257 (1821), which characterized a "suit" as "prosecution or pursuit of some claim, demand or request; in law language, it is the prosecution of some demand in a court of justice." In *Fiske*, the effect of the "demand

in a court of justice" against Missouri was declaratory and injunctive relief, which this Court held to be precluded by the Eleventh Amendment.

Lower courts, even in bankruptcy cases, likewise in the past looked to the effect on states, not the procedural context, in applying the Eleventh Amendment. For example, in *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449 (6th Cir. 1982), the Sixth Circuit held that the Eleventh Amendment applied to a debtor's request by summary "application", rather than a full-fledged suit, for turnover of funds from a state. Similarly, in *In re Lush Lawns, Inc.*, 203 B.R. 418, 421 (Bankr. N.D. Ohio 1996), the bankruptcy court posed the query "whether the *Seminole* rationale is distinguishable from the present matter on the premise that the instant matter is a contested matter under Rule 9014, Bankr.R., rather than a law 'suit' addressed under the Eleventh Amendment." Reasoning that the debtor in *Lush Lawns* sought essentially contempt and injunctive relief against a state, and that *Seminole*[5] had likewise involved a request for injunctive relief, the court found *Seminole* and the Eleventh Amendment fully controlling, notwithstanding the absence of a traditional complaint and summons.

The Fifth Circuit in this case, again borrowing from the Fourth Circuit's *Antonelli* decision[6], determined that only adversary proceedings, not "a bankruptcy case in and of itself" implicate the Eleventh Amendment. 142 F.3d at 821-22. Since

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[5]*Seminole Tribe v. Florida*, 517 U. S. 44, 116 S. Ct. 1114 (1996).

[6]123 F.3d at 786-87. This portion of *Antonelli* appears to be mere dicta, the Fourth Circuit having previously held that Maryland was estopped from objecting after-the-fact to a confirmation order to which it did not previously object, despite receiving full and adequate notice. It was therefore unnecessary for the Fourth Circuit to have considered Maryland's Eleventh Amendment arguments on their merits.

the Bankruptcy Rules (for reasons having to do with streamlining administration of large numbers of bankruptcy cases) do not require an adversary proceeding to obtain entry of a discharge order, the Fifth Circuit determined that discharge does not involve a suit against a state for Eleventh Amendment purposes, despite the effect (declaratory and injunctive in nature) of discharge orders on states. One district court has disagreed. In *Kish v. Verniero*, 212 B.R. 808 (D. N.J. 1997), the court rejected the argument that discharging a debt does not implicate the Eleventh Amendment. "[T]he relevant inquiry for Eleventh Amendment purposes is whether a state's potential legal rights are affected. Because discharging a debt would clearly have such an effect, appellant's argument must fail." *Id.* at 814.

The Fifth Circuit's opinion in this case and the Fourth Circuit's *Antonelli* dicta have dramatically changed the landscape in bankruptcy cases from what had previously appeared to exist. At least two lower courts have quickly picked up and adopted the reasoning that "only adversary proceedings implicate the Eleventh Amendment." *Clerk v. N.V.R. Homes, Inc.*, __ B.R. __, 1998 WL 410882, *5 (E.D. Va. 1998)("NVR's initiation of the contested matter was not a suit 'against one of the United States'"); *In re Barrett Refining Corp.*, __ B.R. ___, 1998 WL 324191, *7 (Bankr. W.D. Okla. 1998)("a bankruptcy case is not a 'suit' within the meaning of the Eleventh Amendment"). Thus, a rule appears to be rapidly evolving in bankruptcy cases – contrary to the prevailing rule in other federal courts and the *Madeline Marie Nursing Homes* and *Lush Lawns* bankruptcy cases – that the procedural context of a dispute with a state, not the effect an action may have upon a state, determines whether the Eleventh Amendment applies.

This evolving "procedural context is determinative" rule is traceable in part to the many procedural quirks that exist in bankruptcy cases. Whereas suits in other federal courts generally fall into fairly recognizable procedural formats – an initial complaint, summons and answer, or counter-claims or joinders of

third parties – bankruptcy cases employ a wide variety of procedural mechanisms, many of them based upon the practicalities of administering large volumes of cases in an efficient manner.

Relief may be requested from bankruptcy courts by adversary proceeding (Bankruptcy Rule 7001 et seq.), motion (Bankruptcy Rule 9014), application (Bankruptcy Rules 2014 and 2016), request [11 U.S.C. § 503(a)], by being included in a Chapter 11 or 13 plan that requires neither a motion nor a complaint to be set for hearing (Bankruptcy Rules 3001, 3007), by "modification" to a plan (Bankruptcy Rule 3019), or by an objection filed as part of the claims process (Bankruptcy Rule 3007). Any one of such forms of seeking relief may impact states' interests as they concern either the debtor or the debtor's property, which becomes "property of the estate" upon the filing of the bankruptcy petition. Bankruptcy Rule 9014 denominates disputes other than adversary proceedings as "contested matters." Therefore, if the governing rule in bankruptcy cases is to be that the Eleventh Amendment does not apply to "contested matters", the Amendment's scope in bankruptcy will have shrunk considerably, being limited to nine or ten[7] types of disputes listed in Rule 7001.

As this Court has held, "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties... [I]ts ultimate justification is the importance of ensuring that the States' dignitary interests can be fully vindicated." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146, 113 S.Ct. 684, 689 (1993).

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[7] As discussed in succeeding text, one of the ten types of relief identified in Rule 7001 – subordination – can also be brought as part of a plan.

What the Fifth Circuit did not carefully analyze was the extent to which states' "dignitary interests" can be affected in contested matters. As the leading bankruptcy treatise accurately states, "contested matters resemble adversary proceedings in that there are (at least) two parties who are opposing each other with respect to relief sought by one of them." 10 *Collier on Bankruptcy* (15th ed. Rev. 1998), ¶ 9014.01. *See also In re Valentine*, 196 B.R. 386 (Bankr. E.D. Mich. 1996)(a contested matter under Rule 9014 is "an adversarial process.")

Many aspects of adversary proceedings that can affect states' "dignitary interests" are made applicable to contested matters by Bankruptcy Rule 9014, which incorporates, directly from the adversary proceeding rules, joinder practice, discovery procedure, consolidation, summary judgment practice and procedures for entry, stay and enforcement of judgments. The adversary proceeding rules (Bankruptcy Rules 7001 et seq.) in turn largely mirror the Federal Rules of Civil Procedure. If a debtor seeks relief against a state in a Chapter 11 plan of reorganization, for example, and the state contests the plan, Rule 9014 makes the plan process a contested matter and the debtor is free to seek discovery from the state, join any other parties necessary for a resolution of issues, seek summary judgment on legal grounds, and request entry of a confirmation order that will have full preclusive effect, as a final judgment of a federal court, against the state. The plan confirmation process can result in determinations of the amount of claims owed or not owed (in essence, a declaratory judgment), the classification of debts, the terms of debt repayment post-confirmation, and the circumstances under which creditors may or may not exercise legal remedies post-confirmation (in essence, a permanent injunction against proceeding against a debtor other than as set forth in the plan and confirmation order). It is hard to fathom how a state's "dignitary interests", as well as its legal rights, are not impacted by a such a process, merely because the

initial pleading was not styled as a complaint and no summons was issued.[8]

Nothing better illustrates the anomalous results fostered by the "no adversary proceeding/no Eleventh Amendment" rule than a debtor's attempt to subordinate a state's asserted interest in property of the bankruptcy estate. Under Bankruptcy Rule 7001(8), if a debtor desires, outside of a plan, to subordinate any allowed claim or interest, the debtor must file an adversary proceeding. Under the rationales of even the Fifth Circuit below or the Fourth Circuit in *Antonelli*, such an adversary proceeding, if brought against a state, would implicate the Eleventh Amendment. However, Rule 7001 goes on to provide that no adversary proceeding is required "when subordination is provided in a chapter 9, 11, 12, or 13 plan." Thus, if debtor's counsel has enough foresight to include a subordination provision affecting a state in a plan, the state has no right to assert the Eleventh Amendment as a defense, under the Fifth and Fourth Circuits' reasoning. This would be so notwithstanding the fact that the relief sought would have the very same substantive effect on the state, whether brought in the procedural context of an adversary proceeding or a contested matter. Similarly, in this case, the bankruptcy court's discharge order has the effect of a permanent

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[8]The Fifth Circuit sought to justify its "contested matters don't implicate the Eleventh Amendment" rationale by positing the existence of a "Hobson's Choice" whereby a state must decide either to appear in bankruptcy court (to contest a plan, for example) and thereby subject itself to the court's jurisdiction, or to stay out of bankruptcy court and suffer the consequences of bankruptcy court orders with full preclusive effect. There is no such "Hobson's Choice," and the Fifth Circuit's attempt to create one is fundamentally flawed. States have every right to enter special appearances to raise Eleventh Amendment objections to federal court actions without submitting themselves to federal court jurisdiction. *Missouri v. Fiske*, 290 U.S. 18, 24-25, 54 S.Ct. 18, 20 (1933); *In re Sec'y of Dept. of Crim Control & Public Safety*, 7 F.3d 1140, 1148 (4th Cir. 1993), *cert. den.* 511 U.S. 1109, 114 S.Ct. 2106 (1994)

injunction against the State of Texas, despite well-settled law that injunctions against states implicate the Eleventh Amendment [*Cory v. White*, 457 U.S. 85, 91, 102 S.Ct. 2325, 2329 (1976)] and this Court's conclusion that the Eleventh Amendment applies to requests "to restrain the government from acting." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101, n.11, 104 S.Ct. 900, 908-09, n.11. (1984).

Under the "procedural context is controlling" rationale of the Fifth Circuit below and the other courts which have jumped on that bandwagon in the wake of *Antonelli*, whether the Eleventh Amendment applies in a given case is no longer to be determined by the Constitution or by this Court's cases applying the Eleventh Amendment. Instead, the Bankruptcy Rules Committee, which drafts the Bankruptcy Rules subject to oversight by this Court in a non-adversarial process, has been given *de facto* power to determine the scope of the Eleventh Amendment in bankruptcy cases. What Congress cannot do directly by abrogating states' immunity under its Art. I, § 8 powers[9], the Bankruptcy Rules Committee cannot do indirectly by defining what does and does not have to be brought in an adversary proceeding.

Because of the large number of bankruptcy cases, and the need for bankruptcy courts to be involved to some degree in many aspects of debtors' financial affairs, different procedural mechanisms have evolved for processing such cases. That, however, is not an adequate reason to carve bankruptcy courts out of the Eleventh Amendment's reach. The Eleventh Amendment by its express terms applies to *all* federal courts, and bankruptcy courts, pursuant to 28 U.S.C. § 1334(a), operate as units of the federal district courts.

If the "procedural context is determinative" rule adopted by the Fifth Circuit in this case, the Fourth Circuit in *Antonelli*, *supra,* and the lower courts rapidly following their lead is not

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[9] *Seminole*, 517 U.S. at 72-3, n.16, 116 S.Ct. at 1131-32, n. 16

corrected, a road map around the Eleventh Amendment will have been created. To illustrate how this end run around the Eleventh Amendment can work, an analogy can be drawn to Congress' efforts to use its Art. I, § 8 powers over Indian tribes to give federal courts a role in resolving disputes between states and tribes, the subject of this Court's opinion in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996).

Were Congress to use its Art. I, § 8 powers under the Indian Commerce Clause to address Indian tribe/State disputes as it has used its Art. I, § 8 Bankruptcy Clause powers, it could simply amend the Indian Gaming Regulatory Act to allow Indian tribes to file an "application" with a federal court for an order compelling states to negotiate with the Tribes. States could be given notice that an order would be entered by the court unless they appeared to show cause why no order should be entered, with states bound by the order if they failed to appear.

Would such an arrangement be constitutional, under *Seminole* and the Eleventh Amendment? The answer is surely "no." Though no "complaint" would ever be filed and no "summons" would ever issue purporting to compel a State to appear in federal court, Congress nevertheless would be using its Art. I powers to affect a State's legal rights and (importantly for Eleventh Amendment purposes) would be using the federal courts as the tool for ordering states to negotiate with the Indian tribes. States' important constitutional rights under the Eleventh Amendment, an integral part of our system of federation, would, be forfeited under such an approach.

Congress in the Bankruptcy Code and the Bankruptcy Rules Committee, exercising authority conferred on it by Congress (again using its Art. I Bankruptcy Clause power), have not chosen to procedurally require a complaint and summons to be issued to potentially-affected states for many types of relief available in bankruptcy cases. On that narrow procedural ground, some courts, including the Fifth Circuit here, have concluded there is no

Eleventh Amendment problem in a bankruptcy "case" as such. However, in the words of *Cohens v. Virginia* and *Missouri v. Fiske*, federal bankruptcy courts are entertaining and acting upon "demands in a court of justice." The resulting federal court orders affect, often in substantial ways, states' legal rights. Under the Eleventh Amendment as applied in *Seminole*, that cannot be done, so long as the enabling statute granting jurisdiction to federal courts is an exercise of Congressional authority under Art. I.[10]

Simply because, for reasons of administrative convenience, procedural mechanisms other than the traditional complaint-and-summons have evolved in bankruptcy cases is not sufficient justification to carve those cases out of the Eleventh Amendment's reach. States' legal rights may be affected just as much by an order entered on a motion, application, or plan as by a judgment entered on a complaint. And states' "dignitary interests" may be just as affected by the process employed in seeking federal court orders whether the orders are entered on complaints, motions, applications or plans. Indeed, under Bankruptcy Rule 9014, most of the same discovery and other rules apply to the various types of bankruptcy actions. The effect on states' legal rights and dignitary interests, not procedural quirks and administrative convenience factors, should determine whether the Eleventh Amendment applies or not. Because the Fifth Circuit in this case and the lower courts in other cases are rapidly creating an entirely different rule of decision ("procedure is determinative"), and that rule conflicts with prior decisions of this Court and other federal courts, the Court should grant the writ to resolve the conflict.

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[10]Most lower courts, including all three Courts of Appeal that have considered the issue, agree agree that the Bankruptcy Code was not enacted to implement the Fourteenth Amendment. *Sacred Heart Hospital of Norristown v. Pennsylvania* (*In re Sacred Heart Hospital of Norristown*), 133 F.2d 237 (3d Cir. 1997); *Louisiana v. PNL Asset Management Co.* (*In re Fernandez*), 123 F.3d 241 (5th Cir. 1997); *Schlossberg v. Maryland* (*In re Creative Goldsmiths of Washington, D.C., Inc.*), 119 F.3d 1140 (4th Cir. 1997).

CONCLUSION

This case raises, in the context of the entry of a discharge order in a Chapter 7 bankruptcy case, two important constitutional considerations that involve conflicts between the Courts of Appeal (including the Fifth Circuit below) and cases from this Court and other lower federal courts: (1) whether an in rem jurisdiction exception to the Eleventh Amendment exists in bankruptcy cases, and (2) whether the procedural context of a dispute between a debtor and a state in bankruptcy court determines whether the Eleventh Amendment applies. These questions, both of which are entwined in the issue of whether a bankruptcy court can enter a discharge order that binds a non-consenting state, deserve consideration by this Court in view of the rapidly-evolving case law on these issues in the lower courts. The State of Texas respectfully requests the Court to grant a writ of certiorari in this case to resolve these matters.

Respectfully submitted,

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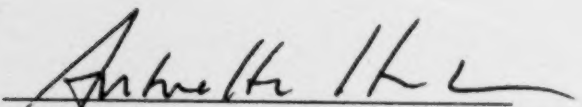

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APPENDIX

No. 97-20106

United States Court of Appeals,
Fifth Circuit.

Appealed from the United States District Court
for the Southern District of Texas.

The STATE OF TEXAS, by and through the BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM and University of Texas Health Science Center at Houston,

Plaintiffs-Appellants,

v.

WILLIAM E. WALKER, M.D.,

Defendant-Third Party Plaintiff, Appellee-Appellant,

v.

Thomas Ollis Hicks, Ellen Clarke Temple; Bernard Rapaport; Thomas Loeffler; Robert James Cruikshank; Zan W. Holmes, Jr.; Martha Ellen Smiley; Lowell H. Lebermann, Jr.; Mario Efrain Ramirez, M.D.; M. David Low, M.D.,

Third Party Defendants-Appellees.

May 28, 1998.

Before DAVIS, JONES and DENNIS, Circuit Judges.
EDITH H. JONES, Circuit Judge:

This case presents a straightforward employment and contract dispute mired in a procedural thicket. Our task is to untangle the thicket, although, unhappily, we cannot finally resolve the merits. We conclude, first, that the case was correctly removed by University President Low, a counterclaim defendant newly-joined on a "separate and independent claim" for purposes of 28 U.S.C. § 1441(c). Second, the court did not err in shielding the counterclaim defendants from Walker's § 1983 claims on qualified immunity grounds. Third, Walker's debt to the state for fees he owed before he filed for bankruptcy relief is dischargeable post-*Seminole*, although whether it is nondischargeable under 11 U.S.C. § 523(a)(6) is a question left to be addressed on remand.

I. BACKGROUND

Dr. Walker was a heart surgeon and a tenured faculty member at the University of Texas Health Science Center at Houston ("UTHSC"). As a condition of his employment, Walker joined the Medical Services, Research, and Development Plan ("MSRDP") by executing the standard MSRDP contract in 1980. The MSRDP contract required Walker to remit all professional fees he earned to the University of Texas ("University"). The MSRDP's by-laws define professional fees in part as fees for all court appearances, depositions, or legal consultations. During the period of his employment at UTHSC, Walker received substantial fees for court appearances, depositions, and legal consultations, but he never remitted any of them to the University. When Walker's noncompliance with the MSRDP came to the attention of the University, it investigated Walker's and other faculty members' personal retention of professional fees. Walker and the other faculty members denied that they retained fees in violation of the MSRDP. After attempts to settle the resulting contractual disagreement failed, Walker was terminated by the Board of Regents of the University of Texas System in August 1994.

Prior to his termination, Walker filed for bankruptcy relief under Chapter 7 on September 1, 1992. His debts were discharged by the bankruptcy court on January 19, 1993. The University was not identified as a creditor in Walker's no-asset bankruptcy filing, and it did not file a proof of claim.

In February 1995, the State of Texas, by and through the Board of Regents of the University of Texas System and UTHSC ("State"), filed suit against Walker in state court. The State alleged conversion and breach of contract and sought an accounting of the fees retained by Walker. Walker counterclaimed against the State, made additional claims against the Regents in their individual capacities ("Regents"), and joined as an additional defendant UTHSC's president, M. David Low, in both his official and individual capacities. Walker alleged state tort and breach of contract claims, as well as substantive due process and equal protection claims pursuant to 42 U.S.C. § 1983, all of which were related to his allegedly improper termination.

The counter-defendants removed this case to federal court pursuant to 28 U.S.C. § 1441(c). The State and Walker subsequently filed motions for summary judgment. The district court granted partial summary judgment to the State, the Regents, and Low, dismissing Walker's federal § 1983 claims with prejudice based on sovereign and qualified immunity. The district court also granted partial summary judgment to Walker, holding that the fees Walker retained prior to his filing bankruptcy on September 1, 1992, were discharged. The district court remanded to state court Walker's state-law claims against the State, the Regents, and Low, as well as the State's claims against Walker for fees earned after September 1, 1992.

Walker now appeals the district court's grant of summary judgment to the Regents and Low based on qualified immunity. The State appeals the district court's grant of summary judgment to Walker based on discharge in bankruptcy for Walker's fees earned pre-bankruptcy.

II. PROPRIETY OF REMOVAL

As an initial matter, Walker argues that the district court lacked jurisdiction to hear this case because removal by the Regents and Low under 28 U.S.C. § 1441(c) was improper. We review a district court's determination of the propriety of removal de novo. *See Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir.1995). Section 1441(c) is difficult to interpret, but under this court's precedent, it permitted removal of the case.

A. Carl Heck Engineers

Although there is a split among the circuits on the point, this court has held that a third-party indemnity defendant may remove a case to federal court pursuant to § 1441(c). *See Carl Heck Engineers v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir.1980).[1] Neither the Regents nor Low is a third-party indemnity defendant because there is no basis for Walker to assert that they are liable for any part of his alleged debt to the state. *See* FED.RULE CIV.P. 14; TEX.RULE CIV.P. 38. Rather, the Regents, joined in their individual capacities, and Low, newly joined both in his official and individual capacities, are counter-defendants in Walker's counterclaim. This court has not previously extended the *Carl Heck* rationale to ordinary counter-defendants. Doing so would fly in the face of the well-pleaded complaint rule where the

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[1]For a discussion of the circuit split, see 14A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 388-393 (1985 & Supp.1997). *See* generally Michael C. Massengale, Note, Riotous Uncertainty: A Quarrel with the "Commentators' Rule" Against Section 1441(c) Removal for Counterclaim, Cross-Claim, and Third-Party Defendants, 75 TEX.L.REV. 659 (1997) (citing relevant cases with analysis).

counter-defendants were the same parties as the state court plaintiffs.[2]

Here, however, the consequence of permitting removal satisfied *Carl Heck* without breaching the well-pleaded complaint rule. We shall assume that the Regents cannot remove under § 1441(c) when joined in their individual capacities as counter-defendants, because (in their official capacities) they were the plaintiffs by and through whom the state sued Walker. Low, on the other hand, was not a party in the case in any way before Walker sued him for § 1983 violations. If the rationale of *Carl Heck* correctly affords third-party defendants the opportunity of § 1441(c) removal to federal court, to which they could have removed when sued alone, then that rationale protects Low.

B. Separate & Independent

Section 1441(c) authorizes removal to federal court of cases in which a "separate and independent" federal claim or cause of action is joined with a nonremovable claim or cause of action.[3]

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[2]The well-pleaded complaint rule bases removal jurisdiction on the existence of a claim lying within federal jurisdiction on the face of a plaintiff's well-pleaded complaint. There has never been a suggestion that a defendant could, by asserting an artful counterclaim, render a case removable in violation of the well-pleaded complaint rule. See, e.g., *Rivet v. Regions Bank*, ___ U.S. ___, 118 S.Ct. 921, 139 L.Ed.2d 912 (1998)

[3]Section 1441(c) states in full:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by § 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c).

A federal claim is separate and independent if it involves an obligation distinct from the nonremovable claims in the case. *See American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14, 71 S.Ct. 534, 540, 95 L.Ed. 702 (1951) ("[W]here there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."); *see also* 14A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3724, at 364-66 (1985 & Supp.1997).

Walker contends that his claims against the Regents and Low were not "separate and independent" from his counterclaims against the State and, therefore, the district court lacked subject matter jurisdiction to hear this case. He is mistaken. *Finn* states that there is no "separate and independent" claim when the plaintiff

> suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

Finn, at 13, 71 S.Ct. at 539-40 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927)). Thus, a case involving the violation of a single primary right or wherein a party seeks redress for one legal wrong cannot contain separate and independent claims, despite multiple theories of liability against multiple defendants. See *Finn*, at 13-15, 71 S.Ct. at 540; *Able v. Upjohn Co.*, 829 F.2d 1330, 1332 (4th

Cir.1987).[4] When applied to a third-party defendant, this rule requires that the plaintiff's claims against the original defendant be "separate and independent" from the defendant's federal claims against the removing third-party defendant. *See Carl Heck Eng'rs*, 622 F.2d at 136; *see* also *In re Wilson Indus., Inc.*, 886 F.2d 93, 96 (5th Cir.1989); 14A WRIGHT ET AL., *supra*, § 3724, at 392-94.

In asserting that his claims against the State are not separate and independent from his claims against the Regents and Low, Walker is barking up the wrong tree. The proper comparison is between the State's claims against Walker and Walker's federal claims against the Regents and Low. The State seeks redress for Walker's alleged failure to remit his professional fees to the University. In contrast, Walker seeks redress from the Regents and Low for allegedly improperly terminating him. The State's claims against Walker and Walker's claims against the Regents and Low thus involve two distinct wrongs. Whether Walker was improperly terminated is a distinct wrong not dependent on whether Walker improperly retained professional fees in violation of the MSRDP.

Second, proof of Walker's § 1983 claims against the Regents and Low would not involve substantially the same facts as proof of the State's claims against Walker. If a substantive due process claim is cognizable at all, Walker must show that he had and was arbitrarily deprived of a property right in his employment. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 220-23, 106 S.Ct. 507, 511-12, 88 L.Ed.2d 523 (1985) (assuming without deciding that a substantive due process claim exists for an adverse decision of an academic institution). Regarding his equal

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[4]In addition, *Finn* has been read to question whether claims can be separate and independent when they involve substantially the same facts and transactions. *See Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 104 (5th Cir.1996); *Able*, 829 F.2d at 1332-33; *Addison v. Gulf Coast Contracting Servs., Inc.*, 744 F.2d 494, 500 (5th Cir.1984).

protection claim, Walker must show that he was treated differently during his termination proceedings than were other similarly situated doctors and that there was no rational basis for this difference in treatment. *See United States v. Abou-Kassem*, 78 F.3d 161, 165 (5th Cir.1996). In contrast, for the State to succeed on its state- law claims against Walker, it must initially show that Walker breached his MSRDP contract, and its claims would not require proof of substantially the same facts as will be relevant to Walker's § 1983 claims against the Regents and Low.

As a consequence, the State's claims against Walker are separate and independent from Walker's federal claims against the Regents and Low, and removal under § 1441(c) was procedurally proper. [5]

III. QUALIFIED IMMUNITY

The district court granted partial judgment as a matter of law on the ground of qualified immunity to the Regents and Low, in their individual capacities, with respect to Walker's § 1983 claims. A grant of judgment as a matter of law is reviewed de novo, examining the evidence in the light most favorable to the nonmovant. *See Channer v. Hall*, 112 F.3d 214, 216 (5th Cir.1997). The moving party will prevail if he has demonstrated that there is no genuine issue of material fact, and that he is entitled to judgment as a matter of law. See *Id.*

Qualified immunity shields a public official exercising discretionary functions from liability for civil damages unless the

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[5]Walker incorrectly cites *McKay v. Boyd Constr. Co.*, 769 F.2d 1084 (5th Cir.1985), in support of his contention that removal was improper. *McKay* involved removal under § 1441(a), not § 1441(c). The *McKay* court expressly distinguished its holding under § 1441(a) from its understanding of how the case would have come out had removal been proper under § 1441(c). *See Id.* at 1087-88. *McKay* is inapplicable to our removal analysis in this case.

public official's conduct violated clearly established constitutional or statutory rights of which an objectively reasonable person should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 532-33 (5th Cir.1997). This court reviews a claim of qualified immunity under a two-part analysis. First, it must be determined whether the plaintiff alleged the violation of a clearly established constitutional right. *See Coleman*, 113 F.3d at 533. Second, if so, we determine whether the defendant's conduct was objectively reasonable. *See Id.*

The "touchstone" of the qualified immunity analysis is the "objective legal reasonableness" of the public official's conduct. *Anderson v. Creighton*, 483 U.S. 635, 637-41, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). That is, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S.Ct. at 3039; *see also Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986) (stating that qualified immunity is designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law").

A. Substantive Due Process

This court has said, "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir.1993). *Moulton* exaggerated the status of a substantive due process claim for academic protection, however, because the Supreme Court has not squarely decided the issue. *See Ewing*, at 220-23, 106 S.Ct. at 511-12. *Moulton* held that no constitutionally protectable property interest existed, so it did not reach the question of arbitrary

deprivation. In this case, as in *Ewing*, even if Walker's tenure is a property right, he has failed to show that the Regents' or Low's actions in terminating him were arbitrary or capricious.

Walker essentially argues that when the Regents terminated him at the instigation of Low, rejecting a faculty tribunal's contrary recommendation, the Regents denied him a proper hearing, acted partially, and failed to fully consider his arguments and defenses regarding his retention of professional fees. Both the Supreme Court and this court have held in related contexts that substantive due process requires only that public officials exercise professional judgment, in a nonarbitrary and noncapricious manner, when depriving an individual of a protected property interest. *See Ewing*, at 223-26, 106 S.Ct. at 513; *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir.1992).

Walker did not remit to the University the substantial outside professional fees he earned while a UTHSC professor. The University alleged that his actions violated the MSRDP, and Walker contended that they did not or, even if they did, his debt was discharged in bankruptcy. Walker was afforded a hearing before the Regents regarding this dispute. They considered his side of the story and rejected it. Having reviewed the record, we cannot conclude that the Regents' determinations--that Walker retained professional fees that belonged to the University and moreover, that he refused to cooperate in resolving the matter--so lacked a basis in fact that their decision to terminate him was arbitrary, capricious, or taken without professional judgment.[6] At best, one might argue that reasonable minds could disagree on the

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[6]Walker also argues that the Regents and Low acted arbitrarily by (1) ignoring the fact that his debt had been discharged and (2) violating 11 U.S.C. § 525(a) which prohibits a governmental unit from terminating an employee because the employee has not paid a dischargeable debt. Inasmuch as the dischargeability of this debt is not yet settled, *see infra* Part IV(B), appellees were entitled to qualified immunity against these claims.

propriety of Walker's termination, and that is insufficient to defeat a public official's qualified immunity. *See Malley*, at 341, 106 S.Ct. at 1096. Consequently, the Regents' and Low's actions in terminating Walker either were not unconstitutional or were not objectively unreasonable in light of the law as it existed at the time of Walker's firing. The district court properly granted qualified immunity.

B. Equal Protection

"The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.' " *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir.1988) (*quoting City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). As the district court correctly concluded, Walker is not a member of a suspect class. Therefore, under equal protection analysis, rational basis scrutiny applies. *See Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir.1997).

Walker argues that the Regents and Low treated him differently from other similarly situated UTHSC faculty members who failed to remit their professional fees to the University. He is incorrect. Walker's case is factually distinct because he defied the University and refused to cooperate in resolving the dispute over the MSRDP. The other "similarly situated" faculty members to whom Walker refers all cooperated with the University, and most eventually reached settlement agreements regarding their improperly retained professional fees. Because any difference in treatment between Walker and other faculty members was based on distinctions in their factual situations, the Regents and Low had a rational basis for their treatment of Walker. The counter-defendants are entitled to qualified immunity from Walker's equal protection claim.

IV. DISCHARGE IN BANKRUPTCY

The State contends that the district court erred in holding that Walker's debt to the University for professional fees earned prior to September 1, 1992, was discharged. The State makes two arguments: (1) the Eleventh Amendment barred the bankruptcy court from discharging Walker's debt to the State; and (2) Walker's debt was nondischargeable under 11 U.S.C. § 523(a)(6) because it was a "willful and malicious injury" against the State. We hold, first, that the Eleventh Amendment did not preclude the discharge of Walker's debt to the State, and second, that there exists a fact issue regarding whether Walker's debt was nondischargeable under § 523(a)(6).[7]

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[7]The State raised the Eleventh Amendment defense for the first time on appeal to this court, asserting that "it is ... not clear that the bankruptcy court had jurisdiction to discharge an obligation to [UTHSC]." Specifically, the State (1) mentions a potential Eleventh Amendment problem without substantive discussion in a footnote of its reply brief, (2) filed a Fifth Circuit Rule 28(j) letter prior to oral argument bringing to this court's attention a somewhat relevant case, and (3) discussed the Eleventh Amendment at oral argument. While the State has been less than helpful in supplying any case law or arguments to support its contention that the Eleventh Amendment barred the discharge of Walker's debt, it nonetheless has not waived the issue. Because of the strong federalism concerns behind the Eleventh Amendment, we may properly consider the issue even at this stage of the proceeding. *See Edelman v. Jordan*, 415 U.S. 651, 675-79, 94 S.Ct. 1347, 1362-63, 39 L.Ed.2d 662 (1974); *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir.1988).

A. The Eleventh Amendment and Bankruptcy Discharge

Walker's bankruptcy filing did not list the State as a creditor, and the State did not file a bankruptcy proof of claim. In fact, the State did not participate in any manner in Walker's bankruptcy case. Subsequently, in this entirely separate proceeding, the State sued Walker for conversion and breach of contract. Walker asserted the affirmative defense that his debt to the State was discharged in bankruptcy. The district court agreed with Walker, insofar as his debt to the State consists of professional fees earned prior to Walker's bankruptcy.

Consequently, the precise issue here is whether the Eleventh Amendment prevents the discharge of a debt owed to a state in a bankruptcy proceeding in which the state does not participate in any fashion.[8] In deciding that it does not, we mean only that the discharge may be raised as a defense to the state's suit

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[8]Prior to *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), some courts held that debts owed to a state were dischargeable in bankruptcy even if the state had not filed a proof of claim. *See In re Glidden*, 653 F.2d 85, 89 (2d Cir.1981); *Connecticut v. Crisp*, 521 F.2d 172, 178 (2d Cir.1975); *Iowa State Dep't of Soc. Servs. v. Morris*, 10 B.R. 448, 455-56 (Bankr.N.D.Iowa 1981). The rationale behind these cases is that the Eleventh Amendment only protects a state from federal court money judgments paid out of the state treasury. *See Crisp*, 521 F.2d at 178; *Morris*, 10 B.R. at 456. Because a judgment of discharge in a bankruptcy case does not require payment out of a state's coffers, discharge does not implicate the Eleventh Amendment. *See Crisp*, 521 F.2d at 178; *Morris*, 10 B.R. at 456. The reasoning of these cases is incorrect, as expressed clearly and emphatically in *Seminole*: "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury, it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole*, 517 U.S. at 58, 116 S.Ct. at 1124 (internal citations and quotations omitted)

on the debt.[9]

The Eleventh Amendment jurisdictionally bars a suit in federal court by a private individual against an unconsenting state--absent waiver or congressional abrogation of sovereign immunity pursuant to section five of the Fourteenth Amendment--regardless of the relief sought by the plaintiff. See U.S. Const. amend. XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 56-58, 116 S.Ct. 1114, 1124, 134 L.Ed.2d 252 (1996). This court has recently held that even in an area of the law under the exclusive control of the federal government, such as bankruptcy, the Eleventh Amendment absolutely bars such suits. *See In re Estate of Fernandez*, 123 F.3d 241 (5th Cir.1997) (holding attempted statutory waiver of sovereign immunity under 11 U.S.C. § 106(a) unconstitutional).[10]

Cases that have considered *Seminole's* impact on bankruptcy practice have generally concerned adversary proceedings brought by the trustee or a party in interest against the

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[9]The State does not assert that the Eleventh Amendment barred the federal district court from adjudicating Walker's defense of discharge in this case. Once the case was removed, the court had jurisdiction over the State's claims against Walker, and his assertion of the discharge defense was not equivalent to seeking affirmative relief, such as an injunction against further collection efforts under 11 U.S.C. § 524. We have no occasion to consider the road not taken by Walker.

[10]It is also well settled that suits against certain state agents or instrumentalities fall within the Eleventh Amendment's compass. *See Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, ___ - ___, 117 S.Ct. 900, 903-04, 137 L.Ed.2d 55 (1997). The parties in this case do not dispute that UTHSC and the Regents of the University of Texas, sued in their official capacities, may invoke the State's Eleventh Amendment immunity; they are "arms" of the state for purposes of the Eleventh Amendment. *See Id.; United Carolina Bank v. Board of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 556-61 (5th Cir. Unit A 1982).

state in federal court to recover money damages.[11] Just as *Seminole* renders 11 U.S.C. § 106(a) unconstitutional, it perforce deprives federal courts of jurisdiction over these unconsented-to suits against the state. The extent to which filing a proof of claim constitutes waiver of this immunity is uncertain. The Fourth Circuit has held that even where the state filed a proof of claim for one type of past due taxes, it did not waive Eleventh Amendment immunity against an adversary proceeding in bankruptcy court to determine a different type of tax. *See In re Creative Goldsmiths*,

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[11]Three recent lower court cases are representative. In *Kish v. Verniero*, 212 B.R. 808 (D.N.J.1997) (Brown, J.), and *Rose v. United States Dept. of Educ.*, 214 B.R. 372 (Bankr.W.D.Mo.1997) (Koger, J.), the debtors filed actions directly against the state to determine the dischargeability of certain debts owed to the state. In both cases, the state had not filed a proof of claim in the debtors' bankruptcy proceedings. Both courts held that they lacked jurisdiction pursuant to the Eleventh Amendment to hear the debtors' claims against the state.

In *In re Martinez*, 196 B.R. 225 (D.P.R.1996), the debtors filed for bankruptcy under Chapter 13 in 1985. The debtors listed a tax debt to the Treasury of the Commonwealth of Puerto Rico ("Treasury") on their schedule of creditors, but the Treasury did not file a proof of claim. The district court found that the Treasury was aware of the debtors' bankruptcy petition. A reorganization plan was confirmed by the bankruptcy court in 1986. In 1989, the Treasury (an arm of the state for purposes of the Eleventh Amendment) filed a tax lien on the debtors' property. The debtors alleged that the Treasury had violated the automatic stay and, therefore, should be liable for actual and punitive damages. *See Id.* at 226-27. The district court held that "it is clear that Treasury violated the debtors' automatic stay when Treasury filed a tax lien over debtors' property after the Chapter 13 petition had been filed." *Id.* at 228. Nonetheless, it also held that it did not have jurisdiction over the debtors' claim against Treasury for willful violation of the automatic stay because of Treasury's sovereign immunity, which had not been waived. *See Id.* at 230. Treasury's lien remained in place despite the fact that Treasury both had actual knowledge of debtors' bankruptcy proceeding and refused to participate in that proceeding.

Inc., 119 F.3d 1140, 1149 (4th Cir.1997). Since UTHSC never filed a proof of claim, however, waiver is irrelevant to the present analysis. The pressing issue here is whether a bankruptcy case, in and of itself, constitutes an unconsented suit against a creditor state, so that the debtor's discharge, which "operates as an injunction" against collection of the debt, 11 U.S.C. § 524(a)(2), is ineffectual against the state under the Eleventh Amendment.

The argument for an Eleventh Amendment bar would assert that although the State was not a named defendant in Walker's bankruptcy case, it was an indirect party because its legal rights were adjudicated and altered (albeit without its knowledge) when the bankruptcy court discharged Walker's debt. *Cf. Regents of Univ. of Cal.*, 519 U.S. at ___ - ___, 117 S.Ct. at 904-05 (holding that the "underlying Eleventh Amendment question" is the state's "potential legal liability," not whether any award of damages would actually come from the state's coffers); *Kish v. Verniero*, 212 B.R. 808, 814 n. 5 (D.N.J.1997) (*citing Regents of University of California v. Doe* and stating that "the relevant inquiry for Eleventh Amendment purposes is whether a state's potential legal rights are affected"). If Walker's discharge was valid, then the State was enjoined in perpetuity from collecting that debt. *See* 11 U.S.C. § 524(a)(2). This can be viewed as both subjecting the state to the indignity of the coercive powers of a federal court, *see Seminole*, 517 U.S. at 56-58, 116 S.Ct. at 1124, and significantly altering the legal rights of the state, *see Regents of Univ. of Cal.*, 519 U.S. at ___, 117 S.Ct. at 904.

Put another way, discharging a debt owed to the state either restrains the state from acting by enjoining it from collecting the debt, or compels the state to act by forcing it to file a proof of

claim in bankruptcy court in order to collect the debt.[12] The state is thus presented with a Hobson's choice: either subject yourself to federal court jurisdiction or take nothing.[13] If the state acts, it is potentially forced to waive its sovereign immunity by filing a proof of claim in the bankruptcy court.[14] If the state does nothing, it is permanently barred from collecting its debt and from recovering a pro rata share of the debtor's estate. It can be argued that the Eleventh Amendment should prevent a state from being

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[12]The Supreme Court has held that "[t]he general rule is that a suit is against the sovereign if 'the judgment would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 n. 11, 104 S.Ct. 900, 908 n. 11, 79 L.Ed.2d 67 (1984) (*quoting Dugan v. Rank*, 372 U.S. 609, 620, 83 S Ct. 999, 1006, 10 L.Ed.2d 15 (1963)).

[13]But *see DeKalb County Div. of Family and Children Servs. v. Platter*, 140 F.3d 676, 680 (7th Cir.1998) (arguing that "the imposition of this decision by Congress on the states 'does not amount to the exercise of federal judicial power to hale a state into federal court against its will and in violation of the Eleventh Amendment.' " (*quoting Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir.1997))).

[14]After *Seminole*, some courts have held that a state waives its Eleventh Amendment immunity to some extent when it files a proof of claim in a bankruptcy proceeding. *See, e.g., In re Creative Goldsmiths*, 119 F.3d at 1148-49; *Rose v. United States Dept. of Educ.*, 215 B.R. 755, 761-62 (Bankr.W.D.Mo.1997); *In re NVR L.P.*, 206 B.R. 831, 850-51 (Bankr.E.D.Va.1997) (collecting cases and extensively discussing waiver).

forced to make such a choice.[15]

Resting as it does on extrapolations from Supreme Court cases, this argument is not specious, but it is ultimately unpersuasive on the facts before us. Its key assumption is the equation of a bankruptcy case with a suit against the state, but this assumption is flawed. In a bankruptcy case, in its simplest terms, a debtor turns over his assets, which constitute the estate, for liquidation by a trustee for the benefit of creditors according to their statutory priorities. Bankruptcy law modifies the state's collection rights with respect to its claims against the debtor, but it also affords the state an opportunity to share in the collective recovery. Bankruptcy operates by virtue of the Supremacy Clause and without forcing the state to submit to suit in federal court. *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 787 (4th Cir.1997) ("While resolution of an adversary proceeding against a state depends on court jurisdiction over that state, the power of the bankruptcy court to enter an order confirming a plan ... derives not from jurisdiction over the state or other creditors, but rather from jurisdiction over debtors and their estates.").

From this standpoint, Walker's entitlement to assert his discharge against the state's claims invoked no Eleventh Amendment consequences. The state never was hauled into federal court against its will in the bankruptcy. In fact, because the state was never notified of the bankruptcy and never had the

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[15]But *see New Jersey v. Mocco*, 206 B.R. 691 (D.N.J.1997) (holding that a potential state-court fraud judgment owed to a state that had notice of a pending bankruptcy proceeding and failed to file a proof of claim could be discharged without violating the Eleventh Amendment); *In re Kings Terrace Nursing Home & Health Related Facility*, 184 B.R. 200 (S.D.N.Y.1995) (holding that a state may not recoup pre-petition Medicaid overpayments to the debtor because the state knowingly and intentionally failed to file a proof of claim and, therefore, the debt was discharged when the debtor's bankruptcy plan was confirmed).

opportunity to file a timely claim, bankruptcy law should ordinarily expressly protect the state's claim from being discharged. See 11 U.S.C. § 523(a)(3)(B).[16] That is just the provision on which the state predicates its request for relief against the discharge defense here.

Additional support for our view that the granting of a bankruptcy discharge does not offend the Eleventh Amendment--although commencement of certain adversary proceedings directly against a state that has not filed a proof of claim in a bankruptcy case would do so--derives from hoary Supreme Court authority. The Court has long held that a federal bankruptcy court decision can affect the lien interests of the states. *See Gardner v. New Jersey*, 329 U.S. 565, 67 S.Ct. 467, 91 L.Ed. 504 (1947). In Gardner, the Court overruled an apparent Eleventh Amendment

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[16]11 U.S.C. § 523(a)(3)(B) states that a debtor is not discharged from certain claims, including those for willful and malicious injury, if the creditor was not listed or scheduled by the debtor in time to permit timely filing of a proof of claim and timely request of a determination of dischargeability. Walker, mysteriously, filed a "no-asset" case, in which creditors are informed that they need not file proofs of claim because such filings would be futile. But his failure to notify the University also deprived it of the opportunity timely to pursue a nondischargeability action.

Another peculiarity about this case might have posed an Eleventh Amendment problem but has not been raised. The Bankruptcy Code provides that federal courts have exclusive jurisdiction of four types of nondischargeability claims, including the willful and malicious injury exception, § 525(a)(6), on which the state relies. See 11 U.S.C. § 523(c). This provision ordinarily requires a creditor to proceed only in federal court to obtain a nondischargeability ruling on any of those four grounds, whether or not the creditor received timely notice of the bankruptcy case. *See* 11 U.S.C. § 523(a)(3)(B). The state did not initially pursue this course, however, and does not challenge the current procedural posture of the case. Equally important, Walker has not challenged the state's right to litigate nondischargeability under § 523(a)(6) under the circumstances before us.

objection to the process of adjudicating the validity and priority of competing liens where the state had filed a proof of claim:

> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.
>
> The extent of the constitutional authority of the bankruptcy court in this respect was passed upon in *People of State of New York v. Irving Trust Co.*, 288 U.S. 329, 53 S.Ct. 389, 77 L.Ed. 815. In that case the Court sustained an order of the bankruptcy court which barred a State's tax claim because not filed within the time fixed for the filing of claims. The Court stated, "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

> In the present circumstances there is, therefore, no collision between § 77 and the Constitution.

Gardner, 329 U.S. at 573-75, 67 S.Ct. at 472 (internal citations omitted). Until these cases are overruled, *Seminole* does not and should not impair their force.

This is a roundabout way to concluding that unless Walker's debt was nondischargeable under § 523(a)(6), his discharge could be raised against the state's lawsuit to collect a prepetition debt.

B. The Willful and Malicious Injury Exception to Discharge

The final issue is the applicability of § 523(a)(6) to Walker's acts in breaching his contract and failing to account to UTHSC for his outside earnings.

Section 523(a)(6) bars the discharge of a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A "willful and malicious injury" results from an act done with the actual intent to cause injury, not from an act done intentionally that causes injury. *See Kawaauhau v. Geiger*, ___ U.S. __, 118 S.Ct. 974, 977-78, ___ L.Ed.2d ___ (1998). In other words, "for willfulness and malice to prevent discharge under § 523(a)(6), the debtor must have intended the actual injury that resulted." *In re Delaney*, 97 F.3d 800, 802 (5th Cir.1996). "[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Kawaauhau*, ___ U.S. at ___, 118 S.Ct. at 978. "[I]ntent to injure may be established by a showing that the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury." *In re Delaney*, 97 F.3d at 802.

Neither a claim for breach of contract nor the tort of conversion necessarily involves an intentional injury. *See Kawaauhau*, ___ U.S. at ___, 118 S.Ct. at 977 (negligence and breach of contract); *National Union Fire Ins. Co. v. Care Flight Air Ambulance Serv., Inc.*, 18 F.3d 323, 325 (5th Cir.1994)

(conversion); *In re Moody*, 899 F.2d 383, 385 (5th Cir.1990) (conversion). The act of conversion, however, can result in a "willful and malicious injury." *See McIntyre v. Kavanaugh*, 242 U.S. 138, 37 S.Ct. 38, 61 L.Ed. 205 (1916); *see also Kawaauhau*, ___ U.S. at ___, 118 S.Ct. at 978 (reaffirming the holding of McIntyre). In addition, under Texas law, a claim for breach of contract and the tort of conversion may arise from the same set of facts. *See Care Flight Air Ambulance Serv.*, 18 F.3d at 326.

Walker admits that he acted intentionally when he kept the professional fees he earned while a UTHSC faculty member. Consequently, the issue before this court is whether it is appropriate to grant Walker judgment as a matter of law that his pre-bankruptcy debt to the University is discharged and to conclude that § 523(a)(6) is inapplicable because the injury suffered by the State allegedly was not intended by Walker (*i.e.*, was not "willful and malicious").

The district court found that Walker's retention of his professional fees was an "innocent and technical" act rather than a "willful and malicious injury." *See Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 331, 55 S.Ct. 151, 153, 79 L.Ed. 393 (1934) (Cardozo, J.) ("[A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice."); *see also Kawaauhau*, ___ U.S. at ___, 118 S.Ct. at 978 (reaffirming the holding of *Davis*). For the following reasons, we reverse the district court's grant of judgment as a matter of law to Walker on the issue of § 523(a)(6) nondischargeability. An issue of fact exists regarding whether Walker was aware of his obligations to the University under the MSRDP and nonetheless knowingly kept his professional fees with the intent of depriving the University of money owed to it.

Walker signed his MSRDP contract in 1980. The MSRDP contract expressly states that all fees received by a faculty member for "professional services" are to be assigned to the University.

The MSRDP's by-laws expressly state that "professional fees" include fees for all "court appearances, depositions, or legal consultations." The MSRDP contract and by-law language is crystal clear, and all MSRDP participants were sent a memorandum in November 1990 reminding them that "fees for all court appearances, depositions and legal consultations (including expert witness fees) shall be deposited in the departmental MSRDP account." Walker claims that he did not receive this memorandum and that he did not read the MSRDP by-laws until 1993, months after his September 1992 bankruptcy filing. He also testified that the general belief among UTHSC faculty members was that professional fees earned for legal consulting need not be remitted to the University. The UTHSC faculty tribunal that reviewed Walker's case as part of UTHSC's grievance procedures found that there was a lack of understanding among faculty members about the MSRDP's requirements. Based upon these conflicting facts alone, what Walker knew regarding his obligations under the MSRDP and when he knew it are disputed. If a factfinder were to decide that Walker knew of his obligations under the MSRDP contract and its by-laws, either at the time he signed the contract or received the November 1990 memorandum, then it might also find that Walker knowingly retained his professional fees in violation of the MSRDP, an act which he knew would necessarily cause the University's injury. This, in turn, could result in a finding of "willful and malicious injury." Such factual issues must be submitted to a trier of fact in order to determine if Walker's debt was nondischargeable under § 523(a)(6).

V. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment upholding the Regents' and Low's qualified immunity, and we reverse the district court's judgment regarding Walker's discharge in bankruptcy.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE STATE OF TEXAS, by and through the BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM and the UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON, *Plaintiffs*,	§	
v.	§	
WILLIAM E. WALKER, M.D., *Defendant/ Counter Plaintiff*,	§	
v.	§	
THE STATE OF TEXAS, by and through the BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM and the UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON, *Counter-Defendant*,	§	CIVIL ACTION NO. H-95-4657
and	§	
THOMAS OLLIS HICKS, ELLEN CLARKE TEMPLE, BERNARD RAPOPORT, THOMAS LOEFFLER, ROBERT JAMES CRUIKSHANK, ZAN W. HOLMES, JR., MARTHA ELLEN SMILEY, LOWELL H. LEVERMANN, JR., MARIO EFRAIN RAMIREZ, M.D., and M. DAVID LOW, M.D., each in his or her individual and official capacities, *Third Party Defendants*.	§	

FINAL JUDGMENT

In accordance with the Memorandum and Order granting the State's Motion for Partial Summary Judgment, Walker's claims based on 42 U.S.C. § 1983 are DISMISSED with prejudice.

This is a FINAL JUDGMENT

SIGNED at Houston, Texas, on this 24th day of December, 1996.

(signature)
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE STATE OF TEXAS, by and through the BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM and the UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER AT HOUSTON, *Plaintiffs*,	§	
v.	§	
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MEMORANDUM AND ORDER

I. Factual Background

In July of 1979 William Walker joined the faculty of the medical school of the University of Texas Health Science Center at Houston [hereinafter "UTHSCH" or "University"] as a heart surgeon. His job responsibilities included clinical practice, research, teaching and administration. The University required Walker to join its Medical Service, Research, and Development Plan ("MSRDP"), and in 1980 Walker executed the standard MSRDP contract. In consideration for participation in MSRDP and employment at the University, Walker assigned all his professional income to the University and agreed to comply with the bylaws of the MSRDP.[1] The MSRDP bylaws defined professional income to include fees for "all court appearances, depositions, or legal consultations."[2]

On numerous occasions Walker received fees for court appearances, deposition testimony and legal consultation which he did not give to the University and kept as his personal income. When this came to the attention of the University's auditing department in1992 it began an investigation into Dr. Walker's witnessing activities, which expanded to include other faculty members.[3] The investigation covered the period between 1987

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[1]Exhibit 2 to Appendix 1 to State's Response to Walker's Motion for Partial Summary Judgment (Docket Entry No. 32)

[2]Bylaws of the Medical School of the University of Texas Health Science Center at Houston Medical Service, Development, and Research Plan §§ 4.31 & 4.32, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22).

[3]Hearing of William Walker before the Hearing Tribunal on April 5, 1994, at 73, 74, 70 (hereafter "Hearing").

and the end of January of 1993.[4] The University estimated that Walker had earned $98,350, which he had not turned over to the University.[5] Estimates for six other faculty members ranged from $2,100 to $77,700.[6] The Dean of the University's medical school, John Ribble, wrote to seven doctors on May 14, 1993, requesting an accounting of fees they had retained.

Walker's responses to Ribble reflect a belief that fees did not need to be submitted to the MSRDP unless they related to patients referred through the University.[7] The two other doctors whose responses are in the record wrote Ribble and explained their understanding that fees earned on personal time and not involving direct patient care were exempt from the jurisdiction of the MSRDP.[8] Eventually these two doctors, along with another doctor identified in the University's investigation, reached a settlement with the University over the fees. Two doctors paid back approximately 55% of the amount the University alleged

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[4]Hearing at 49.

[5]Exhibit B to State's Reply to Walker's Response to State's Motion for Partial Summary Judgment (Docket Entry No. 13).

[6]Id.

[7]Letter from William Walker to John Ribble of May 28, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22); letter from William Walker to John Ribble of July 26, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22)

[8]Letter from Donald Parks to John Ribble of May 18, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22); Letter from David Wainwright to John Ribble of May 19, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22)

they owed,[9] and another doctor settled for 22%.[10] The record contains no information on the other doctors who were investigated.

Walker and the University did not reach a settlement. The University requested his tax returns for 1986 through 1992, but he refused to disclose them, citing privacy issued related to his former wife. David Low, President of the UTHSCH, scheduled a meeting with Walker, but Walker continued his refusal to remit the fees to the University or to submit his income tax returns. Low decided to institute termination proceedings against Walker. He wrote Walker on November 3, 1993, to notify him that the University would hold a hearing before a faculty tribunal on whether Walker's failure to remit the fees constituted good cause for revoking his tenure.[11]

Walker retained attorney Larry Boyd to represent him at the hearing and in continuing negotiations with University attorneys. Boyd wrote to University attorney W.O. Shultz on January 14, 1994, that Walker considered the charges against him to be a pretext for illegal motives.[12] Boyd charged that other doctors at the University wanted to prevent Walker from

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[9]State's Reply to Walker's Response to State's Motion for Partial Summary Judgment at 13 & Exhibit E (Docket Entry No. 35).

[10]State's Reply to Walker's Response to State's Motion for Partial Summary Judgment at 13 & Exhibit F (Docket Entry No. 35).

[11]Letter from M. David Low to William Walker of November 3, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22)

[12]Letter from Larry Boyd to W.O. Shultz of January 14, 1994, Appendix C-3 to State's Motion for Partial Summary Judgment (Docket Entry No. 23)

competing with them in their area of expertise. Boyd later informed the University that Walker had filed a Chapter 7 bankruptcy petition in 1992 and that his debts had been discharged in January of 1993. In a March 14, 1994 letter, Boyd claimed that the bankruptcy discharge included any debt Walker may have owed to the University for fees retained through January of 1993 (though still refusing to admit liability for those fees).[13] The letter included an offer to settle the dispute for approximately $5,000, a figure that represented Walker's estimated after-tax outside income during the three-month period between January and May of 1993. Although Walker had continued receiving fees for legal consultation throughout 1993 and 1994, he received a law degree from South Texas College of Law in 1993. Boyd claimed that fees earned after Walker received his law degree were not the property of the University because of the prohibition on lawyers sharing legal fees with non-attorneys. The University rejected the offer and scheduled Walker's termination hearing before the faculty tribunal for April 5, 1994.

At the hearing Walker was represented by Boyd and was allowed to testify, present evidence, and cross-examine the University's witnesses. Walker testified that there had been a general understanding among the faculty that only those fees that were related to a patient referred through the University came under the jurisdiction of the MSRDP.[14] He claimed that he never read the MSRDP contract that he signed in 1980 or the MSRDP bylaws until Ribble contacted him in May of 1993.[15] Walker also informed the tribunal of his bankruptcy and his claim that any pre-

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[13]Letter from Larry Boyd to Frank Collura of March 14, 1994, E Appendix C-3 to State's Motion for Partial Summary Judgment (Docket Entry No. 23)

[14]Hearing at 112-16.

[15]Id. at 111-12, 117.

bankruptcy debts he may have owed to the University had been discharged.[16]

The tribunal found that although the bylaws were clear about what income belonged to the University, many faculty members, including Walker, were unfamiliar with the rules and did not understand whether fees such as those that Walker earned belonged to the University.[17] The tribunal also found no evidence that the University had responded to Walker's offer of settlement other than to schedule the hearing. Accordingly, the tribunal found insufficient cause to terminate Walker's employment.

Low continued to pursue Walker's termination before the Board of Regents of the University of Texas System and recommended that the Board reject the conclusion of the faculty tribunal. At their meeting on August 11, 1994, the Regents considered Walker's termination and heard personal testimony from him.[18] The Regents voted unanimously to terminate Walker for retaining the fees and failing to remit them.

II. Procedural Background

The State of Texas, by and through the University of Texas Board of Regents, and the UTHSCH sued Walker in state court to recover the disputed fees, alleging conversion and breach of contract. Representing himself, Walker asserted several affirmative defenses including discharge in bankruptcy, statute of

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[16]Id. at 105-108.

[17]Findings and recommendations of the Hearing Tribunal, Exhibit 3 to Walker's Response to State's Motion for Partial Summary Judgment (Docket Entry No. 30)

[18]Exhibit 7 to Appendix C-4 to Letter from M. David Low to State's Motion for Partial Summary Judgment (Docket Entry No. 24)

limitations, and waiver. Walker later filed counterclaims against the UTHSCH, the University of Texas Board of Regents, each individual board member, and Low.[19] (These parties will be collectively referred to as "the State," in their capacities as plaintiffs as well as counter-defendants.) Walker alleged violation of 42 U.S.C. § 1983 and several state law causes of action. The State then removed the case to this court. The State moved for partial summary judgment on all of Walker's claims, citing various immunity defenses (Docket Entry No. 18). Walker moved for partial summary judgment on the State's claims based on his discharge in bankruptcy (Docket Entry No. 29), and the State moved for partial summary judgment on the inapplicability of this defense (Docket Entry No. 31). For the reasons set forth below both motions will be granted in part and denied in part.

III. Discussion

A. Walker's State Bankruptcy Discharge

Walker filed a Chapter 7 petition on September 1, 1992,[20] and the bankruptcy judge entered an order of discharge on January 19, 1993.[21] Without admitting liability for retaining the fees in the dispute, Walker argues that any debt to the University he may have incurred before his bankruptcy was discharged. The State argues that the debt was non-dischargeable under 11 U.S.C.

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[19]Walker named the individual parties as "third-party defendants," but this is an inaccurate label under both Texas and federal rules because he is not asserting that they are liable for all or part of his alleged debt to the University. *See* TEX. R. CIV. PRO. 38; FED. R. CIV. PRO. 14.

[20]Exhibit 9 to Appendix I to State's Response to Walker's Motion for Partial Summary Judgment (Docket Entry No. 32).

[21]Exhibit 5 to Appendix I to State's Response to Walker's Motion for Partial Summary Judgment (Docket Entry No. 32).

§ 523(a)(3)(B), which applies to certain unlisted and unscheduled debts and incorporates § 523(a)(6)'s "willful and malicious injury" exception to discharge.

The State argues that by retaining fees Walker converted property of the University. The State argues that conversion is a "willful and malicious injury" under § 523(a)(6), *citing Chrysler Credit Corp. v. Perry Chrysler Plymouth, Inc.*, 783 F.2d 480 (5th Cir. 1986). In that case the president of an auto dealership went to Las Vegas and gambled away funds which the dealership held in trust for a creditor. The State, however, fails to distinguish between "willful and malicious" conversion, which *Chrysler* illustrates, and innocent or technical conversion. In a 1934 Supreme Court decision interpreting the statutory predecessor to § 523(a)(6), Justice Cardozo explained the difference:

> [A] willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. There may be an honest but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a willful and malicious one.

Davis v. Aetna Acceptance Co., 55 S.Ct. 151, 153, (1934) (Citations omitted).

The evidence indicates that there was a general lack of awareness among Walker and his colleagues about the requirements of the MSRDP bylaws with regard to legal fees. Although the bylaws defined professional income to include these

fees, Walker testified that he never read the bylaws until 1993.[22] Walker testified that the general belief in the medical school was that fees for outside legal witnessing did not belong to the University, that the general practice was for faculty members to keep them, and that the University did not challenge this.[23] In 1980 Ribble requested that the bylaws be changed to allow doctors to keep fees for court appearances and depositions, but a 1990 memorandum to MSRDP participants noted that Ribble's request had been denied and reminded participants to deposit these fees with the MSRDP.[24] (Walker testified that he did not see this memorandum.[25]) On May 14, 1993, the same day that Ribble wrote to Walker and the other six physicians about the results of the investigation, Ribble sent another memorandum to MSRDP participants reminding them that the fees which must be submitted to the MSRDP included court appearances, depositions and legal consultations "regardless of the day or time that the services were rendered."[26] Even though faculty members were required to sign and return the memorandum, Ribble sent yet another

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[22]Walker Hearing 111-12, 117.

[23]Id. at 112-16; Walker Deposition at 43, Appendix B to State's Motion for Partial Summary Judgment (Docket Entry No. 20).

[24]Memorandum from James Chamberlain to MSRDP participants of November 20, 1990, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22).

[25]Walker Hearing at 119-20.

[26]Memorandum from John Ribble to MSRDP participants of May 14, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22).

memorandum on December 14, 1993, reminding MSRDP participants of their obligation to submit legal fees.[27]

When the University conducted its audit of the expert witness activities of Walker and other doctors, it did not request an accounting from faculty members who had participated in three or fewer depositions.[28] Of the six doctors whom the University contacted in addition to Walker, the two whose responses are in the record stated that they were unaware that bylaws required them to submit fees for legal witnessing done on their own time.[29] The faculty tribunal found that Walker and other plan members had a "lack of clear understanding" about MSRDP requirements, and that the repeated MSRDP memorandums were evidence of this.[30]

In his brief Walker acknowledges that his retention of the fees was "willful" – but only in the sense that he thought he had a right to keep the fees. Cases have defined "willful" to mean deliberate or intentional and "malicious" to mean in conscious disregard of one's duties or without just cause or excuse. *See Matter of Garner*, 56 F.3d 677, 681 (5th Cir. 1995); *Chrysler*, 783

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[27]Memorandum from John Ribble to MSRDP participants of December 14, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22).

[28]Walker Hearing at 79-80.

[29]Letter from Donald Parks to John Ribble of May 18, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22); Letter from David Wainwright to John Ribble of May 19, 1993, Exhibit 3 to Appendix C-2 to State's Motion for Partial Summary Judgment (Docket Entry No. 22).

[30]Findings and Recommendations of the Hearing Tribunal, Exhibit 3 to Walker's Response to State's Motion for Partial Summary Judgment (Docket Entry No. 30)

F.2d at 486; *In Re McDaniel*, 181 B.R. 883, 887 (S. D. Tex. 1994). But whatever words are used to describe the "willful and malicious" standard, the Supreme Court has held that it does not include an "innocent and technical" conversion. *Davis*, 55 S.Ct. at 153. The evidence before this court establishes that Walker's retention of the fees reflected an "honest but mistaken belief." *Id.* There is no evidence that Walker retained the fees in "conscious disregard" of his duties or the rights of the University. *See In re McDaniel*, 181 B.R. at 887. According to the State's own brief, Walker was not fired for any "mistake" he may have made in interpreting the MSRDP bylaws but because unlike other doctors in his situation he failed to return the fees.[31] Walker may have committed conversion, but the State has not carried its burden of proving that it was "willful and malicious." *See Murphy v. Wheatley*, 360 F.2d 180, 181 (5th Cir. 1966) ("The burden is on the creditor to show which part of the judgment, if any, is based on willful and malicious injury.").

Walker seeks relief from the State's attempt to recover fees that accrued before discharge. The bankruptcy judge issued Walker's discharge order on January 19, 1993. In a voluntary bankruptcy a discharge affects only those debts that accrue before the debtor files his petition. *See* 11 U.S.C. § 727 (b) (discharge applies to debts that arose before "order of relief"); 11 U.S.C. § 301 (defining "order of relief" as date of filing a voluntary petition); *Lubo v. Paulsen*, 886 F.2d 602, 607 n.10 (3rd Cir. 1989). Walker's bankruptcy discharge therefore bars the State from attempting to recover any fees earned before the date of Walker's petition, September 1, 1992, but not fees earned after that date.

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[31]State's Response to Walker's Motion for Partial Summary Judgment at 10).

B. The State's Immunity Defenses

Because of the 11th Amendment bar on suits against states in federal court, this court lacks jurisdiction to hear Walker's claims against the UTHSCH and the Board of Regents, both of which are part of the State of Texas. *See Hans v. Louisiana*, 10 S.Ct. 504 (1890) (extending the 11th Amendment's explicit prohibition on suits brought by citizens of another state to suits brought by a state's own citizens); *Pennhurst State School and Hospital v. Halderman*, 104 S.Ct. 900, 906 (1984); *Clay v. Texas Women's University*, 728 F.2d 714, 715 (5th Cir. 1984) (holding that a state university is part of a State for 11th Amendment purposes). The 11th Amendment also bars suits against State officials sued in their official capacities, except for certain claims for prospective injunctive relief. *Pennhurst* at 909; *Edelman v. Jordan*, 94 S.Ct. 1347, 1357-58 (1974). Walker seeks monetary damages but has not asked for prospective injunctive relief. Finally, the 11th Amendment bars all of Walker's supplemental state law claims against Low and the regents in their official capacities. *Pennhurst*, 104 S.Ct. at 909-11. Accordingly, this court lacks jurisdiction to hear all of Walker's claims against the individual regents and Low in their official capacities.

The 11th Amendment does not bar Walker's § 1983 claims against the individual regents and Low in their individual capacities. The State, however, argues that these individuals are protected by qualified immunity. Qualified immunity shields government officials performing discretionary functions from civil damages liability of "their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 107 S. Ct. 3034, 3038; *Pfannstiel v. Marlou*, 918 F.2d 1178, 1183 (5th Cir. 1990). Walker argues the Regents and Low violated his right to substantive due process of law when they rejected the findings of the faculty tribunal and terminated his employment. "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things; (1) that

he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). *Moulton* cites *Regents of University of Michigan v. Ewing*, 106 S. Ct. 507 (1985), which assumed without deciding that substantive due process protects a tenured teaching position such as Walker's. The Court counseled great deference to state educational officials, however, holding that they could be liable only for "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 513. Walker has not alleged facts showing that the Regents or Low acted in an arbitrary and capricious manner or that they departed so far from academic norms as to demonstrate they did not exercise professional judgment.[32]

Walker's only remaining claims are his State law causes of action against the regents and Low in their personal capacities. The court declines to hear these claims because of the general rule that a dismissal of federal claims should result in dismissal of pendent State law claims. *See Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580, 585 (5th Cir. 1992).

IV. Conclusion and Order

Walker's motion for partial summary judgment on the discharge of his claims (Docket Entry No. 29) is GRANTED in part but DENIED in part. For the same reasons, the State's

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[32]Walker sought to amend his complaint to add § 1983 claims for violations of his right to equal protection and procedural due process. The court denied his motion to add a procedural due process claim (Docket Entry No. 43). Walker's equal protection claim fails because he does not claim to be part of a suspect class. *Woods v. Johnson*, 75 F.3d 1017, 1036 (5th Cir.), *cert. denied* 117S.Ct. 150 (1996); *Green v. McKaskle*, 700 F.2d 1116, 1125 (5th Cir. 1986)

Motion for Partial Summary Judgment on the Inapplicability of This Affirmative Defense (Docket Entry No. 31) is GRANTED in part and DENIED in part. The State's motion for summary judgment (Docket Entry No. 18) is GRANTED with respect to Walker's § 1983 claims but DENIED with respect to his State law claims. Walker's State law claims, along with the State's claims for fees earned after September 1, 1992, are REMANDED to the 80th Judicial District Court of Harris County, Texas.

SIGNED at Houston, Texas, on this 24th day of December, 1996.

(signature)
SIM LAKE
UNITED STATES DISTRICT JUDGE

(2)

98-348

No. 98-350

Supreme Court, U.S.
FILED
NOV 16 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

THE STATE OF TEXAS,

Petitioner,

v.

WILLIAM E. WALKER M.D.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I

The State of Texas raises the issue of Eleventh Amendment immunity from suit in federal court, with respect to bankruptcy issues, in light of the Court's decision in *Seminole Tribe*.

Does the State have a claim that is "ripe" for adjudication by the Court?

II

Here, the State removed the case, and availed itself purposefully of the jurisdiction of the federal courts.

Did not the State, by removing the case, waive its Eleventh Amendment immunity with respect to the "transaction and occurrence" being litigated in the case?

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STATUTE INVOLVED IN THE CASE

Bankruptcy Rule 4007(c) provides:

> A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a).

ADDITONAL STATEMENT OF THE CASE

I. THE STATE OF TEXAS REMOVED THE CASE.

This case began on February 9, 1995, when the State filed an action against Walker, sounding in breach of contract and conversion, in the 80th District Court of Harris County, Texas.

On August 10, 1995, Walker filed a counterclaim against the State, and a third-party claim against the Board of Regents and President of the University of Texas, under both state and federal law.

On September 25, 1995, *the State of Texas* removed the case in the posture of a plaintiff faced with a federal counterclaim.

Walker pointed out to the State that a plaintiff can never remove, even if faced with a federal question counterclaim, and that removal by the State was invalid. The State amended its pleadings over 5 months later, on March 8, 1996, to invoke removal jurisdiction in a third-party defendant (here, the Regents and President) faced with a federal question claim. (Please see Walker's Petition For Writ Of Certiorari for discussion of why this mode of removal was invalid also.)

The State thus availed itself purposefully of federal court jurisdiction, thereby waiving some of its Eleventh Amendment immunity.

II. THE STATE OF TEXAS KNEW OF WALKER'S BANKRUPTCY FOR OVER 2 YEARS BEFORE IT OBJECTED TO HIS DISCHARGE.

Walker informed his immediate supervisor in the State hierarchy of his bankruptcy filing at the time it occurred, September 1, 1992, almost 3 years before the State "objected" to Walker's discharge, on June 24, 1996, in its brief to the District Court. The State argues that the supervisor was an agent unempowered to receive knowledge of a bankruptcy.

It is undisputed, however, that the State's lawyers were informed of Walker's bankruptcy discharge defense to the State's claim against him in early 1994, almost 2½ years before the State filed its initial notice of objection. Such knowledge is memorialized by a writing in the record. State's Petition For Writ of Certiorari at A30.

Walker briefed, to the District Court, the issue of the untimeliness of the State's objection to his discharge, in his motion for summary judgment based on discharge in bankruptcy. The District Court did not reach the procedural issue of lack of timeliness, however, since it determined that the State's objection failed on substantive grounds. The issue was thus not before the Fifth Circuit, but remains a cogent factor in why the State's claim is unripe for adjudication.

REASONS FOR DENYING THE PETITION

I. THE STATE OF TEXAS DOES NOT PRESENT THE COURT WITH A CLAIM THAT IS RIPE FOR ADJUDICATION.

The State asks this Court to consider the issue of Eleventh Amendment immunity to federal court jurisdiction in the context of bankruptcy law after the *Seminole Tribe* decision. *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 114, 134 L. Ed. 2d 252 (1996). The State argues that the bankruptcy discharge of a debtor implies *per se* an affront to the Eleventh Amendment immunity of an unconsenting State, what the State calls an "in rem exception to the Eleventh Amendment."

Such argument is misplaced, however, and not on point with the facts of our case. In the usual case, the state is a known creditor, receives notice of the bankruptcy filing, and has the opportunity to waive, for a limited purpose, the Eleventh Amendment, appear in the bankruptcy proceedings, and protect its interests.

Here, however, the State of Texas was an unknown creditor ("creditor" here meaning claimant only), appearing with a claim in a Texas state court over two years after the debtor's bankruptcy discharge. Despite knowing of Walker's bankruptcy discharge one year before it filed suit, the State waived its right to object to Walker's discharge by not doing so in timely fashion. The State waived also part of its Eleventh Amendment immunity from federal jurisdiction by removing the case to the District Court (please see section II, below).

The State's second argument, that our case represents a potential result adverse to the Eleventh Amendment because of its procedural posture, is likewise misplaced. The State offers the Court a hypothet of an unconsenting state creditor whose rights are adjudicated in its absence. That scenario is different from the facts of our case, where no federal court ordered the State of Texas to do, or not do, anything, before the State waived some of its rights to jurisdictional immunity by removing the case.

An opinion on the hypothet advanced by the State would be merely advisory. Respondent Walker agrees with the State that a state's interests are important in a Eleventh Amendment analysis. The Eleventh Amendment is alive and well – an unconsenting state may not be haled into federal court, nor its rights affected in any meaningful way solely by a federal court judgment. Here, however, the State has consented.

The State's petition for review by this Court not only requests an advisory opinion, but presents a claim that is not ripe for adjudication.

The State has a mere contingent claim against Walker, based on an employment contract dispute under Texas state law that will be heard by a Texas state court. No court of competent jurisdiction has construed the contract. Should such a court construe the contract in Walker's favor, the State will have no claim whatsoever. Even if the State should win the contract construction dispute, no factfinder has found that Walker breached the contract.

Even if the factfinder decide that Walker breached, and the judgment be upheld by the Texas appellate

courts, the automatic stay of the Bankruptcy Code would block initial execution on the judgment. The State would have to petition the Bankruptcy Court to reopen the case over five years after the State knew of the problem, in order to litigate dischargeability of the debt. Such a motion would be untimely in the extreme.

Assuming, *arguendo,* that the initial lack of knowledge, by the State, of Walker's bankruptcy petition and discharge, tolled the 60-day limitations period for objections to his discharge, Bankr. R. 4007(c), the State filed a suit for damages in the state court over *one year* later, and contested dischargeability of the "debt" (based on its mere contingent claim) in the District Court, not the Bankruptcy Court, *two a half years* after it learned of Walker's discharge.

These responses were untimely, and constitute waiver of the right of objection to Walker's discharge.

The standard for "ripeness" analysis is clear. As the Court held unanimously in a recent case, "a claim is not ripe for adjudication if it rests upon contingent future events *that may not occur as anticipated, or may not occur at all* (emphasis added)." *Texas v. United States, et al.,* 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998). In that case, the Court opined " . . . we find it too speculative whether the problem Texas presents will ever need solving . . . "

The same conclusion obtains here. The State of Texas, in essence, says to this Court: "If the contract be construed in our favor, if the factfinder decide that Walker breached the contract, if the judgment be sustained on appeal, if the Bankruptcy Court agree to reopen the case, if the objection to discharge be rejected by the Bankruptcy

Court, and if the judgment be upheld by higher federal courts reviewing the case, *then* we suffer a result from which we ought to be immune under the Eleventh Amendment."

That is a large number of "if clauses". The claim by the State against Walker is far from being a "final decision".

This Court has stressed the need for a "final decision" in administrative proceedings and lower courts before an issue will be ripe for consideration by the Court. See, e.g., *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997).

The State presents the Court a question of law based on a putative legal claim that may fail to clear multiple future hurdles and is, thus, far from a final decision, and unripe for adjudication.

II. THE STATE OF TEXAS WAIVED SOME ELEVENTH AMENDMENT IMMUNITY BY REMOVING THE CASE.

The Court has not decided whether Eleventh Amendment immunity is a matter of subject matter jurisdiction or personal jurisdiction. *Wisconsin Dept. of Corrections v. Schacht*, 118 S. Ct. 2047, 141 L. Ed. 2d 364 (1998). Eleventh Amendment immunity has the flavor of personal jurisdiction, since it can be waived. *Id.*, J. Kennedy, concurring. Subject matter jurisdiction is absolute, however – it can never be waived. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982).

Logic would suggest that if Eleventh Amendment immunity *cannot* be a matter of subject matter jurisdiction, since it can be waived, it *must* be a matter of personal jurisdiction.

Personal jurisdiction is waived by filing a general appearance in a case. Justice Kennedy opined that it can be argued that consenting to removal waives Eleventh Amendment immunity and that such consent "amounts to a direct invocation of the jurisdiction of the federal courts." *Schacht*, supra.

Here, the State of Texas not only consented to removal, but was itself the removing party. That its removal was invalid (please see above, in the Additional Statement Of The Case, section I) in no way detracts from the conclusion that the State purposefully availed itself of federal jurisdiction. How much more cogent is the argument that a state waives Eleventh Amendment immunity when it, itself, removes the case, compared to merely assenting to the removal.

This is entirely consistent with the Court's holding in *Gardner*, cited both by Justice Kennedy, *id.*, and the Fifth Circuit in this case, State's Petition For Writ Of Certiorari at A19, that a State's voluntary filing of a proof of claim in a bankruptcy proceeding constitutes waiver of Eleventh Amendment immunity. *Gardner v. New Jersey*, 329 U.S. 565, 574, 67 S. Ct. 467, 91 L. Ed. 504 (1947).

Justice Kennedy also pointed out the patent unfairness of allowing a state to litigate consentingly in federal court, and then, if it loses, allowing it to assert Eleventh Amendment immunity to the resulting judgment. *Id.*

Respondent suggests to the Court that Eleventh Amendment immunity is waived with respect to the issue being litigated consentingly by a state in federal court – the specific "transaction and occurrence." We do not suggest in any fashion that the litigation of one issue, consentingly, by a state, waives the state's Eleventh Amendment immunity from federal jurisdiction to litigate a separate and independent issue.

Thus, by removing a case and litigating a certain issue, a state waives its right to Eleventh Amendment immunity from an adverse result in the litigation of that particular issue. Here, the State of Texas waived its Eleventh Amendment immunity to an adverse result in Walker's bankruptcy discharge defense, when it purposefully availed itself of federal court jurisdiction by removing the case.

CONCLUSION

The State of Texas has presented to the Court an Eleventh Amendment immunity claim that is not ripe for adjudication at this time. In addition, by removing the case, the State waived its Eleventh Amendment immunity to suit in federal court with respect to the specific subject matter of this litigation.

Respondent therefore opposes the grant of certiorari because of the lack of ripeness, but, should the Court decide to consider the Eleventh Amendment immunity

question, Respondent urges respectfully that the Court consider also the waiver issue.

Respectfully submitted,

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Dated November 16, 1998